

SUPREME COURT JUDGEMENT ON ET FEES

1. Introduction

In a momentous judgement based on the principle of access to justice, the Supreme Court has declared employment tribunal (ET) fees to be unlawful under both domestic and EU law.

2. The decision

In the Supreme Court's view the order that brought the fees regime into effect was unlawful from the outset and must be quashed because it has had the effect of preventing access to justice through the ET system. The immediate consequence is that ET and employment appeal tribunal (EAT) fees cease to be payable under the existing scheme. Presumably, as a result of the judgement, fees that have already been paid will have to be reimbursed by the government, in line with the undertaking given by the Lord Chancellor in July 2013.

3. History of fees

ET and EAT fees were introduced in July 2013. Unless they qualified under the remission scheme ET claimants and EAT appellants had to pay fees in order to bring and pursue their claims or appeals. The remission scheme was on the basis of their disposable capital and gross monthly income.

4. History of litigation

UNISON sought both a judicial review of the legislation and a quashing of the

Fees Order, arguing (amongst other things) that the fees regime breached the EU principle of effectiveness, whereby the procedural requirements for domestic actions must not be liable to render practically impossible or excessively difficult the exercise of rights conferred under EU law. The challenge was rejected by the High Court twice and subsequently by the Court of Appeal in August 2015. The Supreme Court has now unanimously upheld UNISON's challenge. Giving the leading judgement Lord Reed referred to evidence on the impact of fees - in particular a consultation paper published by the Ministry of Justice in January 2017. Lord Reed acknowledged the "dramatic and persistent fall" in the number of ET claims since the Fees Order came into force, representing a reduction in cases of 66-70%. The proportion of claimants receiving fee remission was far lower than the government had anticipated, with the Lord Chancellor's discretionary power to remit fees in exceptional circumstances rarely having been exercised. It was also held to be relevant that the Order had made a much less significant contribution to ET costs than had been expected, had failed to deter unmeritorious claims and did not appear to have resulted in more ACAS settlements.

5. The legal principles

Lord Reed addressed the legal principles involved by focussing on the common law right of access to justice, noting that it: “is not an idea recently imported from the continent of Europe, but has long been deeply imbedded in our constitutional law.” The right of access to the courts could be traced back to Magna Carta in 1215. More recent authorities made it clear that any interference with the right required clear authorisation by statute, which must be interpreted as permitting only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question. He rejected the assumption – evident in the government’s consultation on the introduction of fees – that the provision of services by ETs was of value only to litigants and provided no broader social benefit.

6. The purpose of ETs

Individuals need to know they can enforce their rights if they have to, and businesses need to know there is likely to be a remedy against them if they fail to meet their obligations. ET claims ensure legislation has the deterrent effect Parliament intended, and provide authoritative guidance as to the meaning and application of the relevant legislation and underpinning alternative means of dispute resolution.

7. Restrictions on government

The Court accepted that the purposes underlying the Fees Order – transferring the burden of costs to the “users” of the tribunal system, incentivising earlier settlements, and discouraging weak or vexatious claims – were legitimate. However, the Lord Chancellor could not lawfully impose whatever fees he chose in order to achieve those purposes. The Order would be unlawful if there was a real

risk that it would effectively prevent access to justice. In order for the fees to be lawful they had to be set at a level that everyone could afford, taking into account the availability of full or partial remission.

8. The evidence

The evidence provided led to the conclusion that this requirement was not met. The Review Report acknowledged the: “sharp, substantial and sustained fall” in the volume of cases brought since the introduction of fees. This warranted the conclusion that a significant number of people who would otherwise have brought claims had found the fees to be unaffordable. The Report estimated that around 10% of potential claimants did not bring proceedings because they could not afford the fees, but this was likely to be an underestimate.

9. Hypothetical examples

Lord Reed referred in his judgement to a number of hypothetical examples provided by UNISON in which the need to make savings in order to allow for the payment of the fees would result in households on low or middle incomes falling below the level of income estimated by the Rowntree Foundation as being necessary to meet acceptable living standards. Where households could afford fees only by sacrificing the ordinary and reasonable expenditure required to maintain an acceptable standard of living, the fees could not be regarded as affordable.

10. Other considerations

He added that affordability was not the only consideration. ET fees could also prevent access to justice if they rendered it futile or irrational to bring a claim. He observed that many claims entail no financial award or involve only modest amounts. If, for example,

fees of £390 (for a Type A claim) must be paid to pursue a claim for £500 (the median award for unlawful deduction of wages claims), no sensible person would proceed unless he or she could be virtually certain the claim would succeed, that fees would be reimbursed and the ET award would be paid in full by the employer. In practice, success can rarely be guaranteed and only half of successful claimants receive full payment from the respondent employer. For all these reasons the Fees Order effectively prevented access to justice and so was unlawful.

11. Order not justified

The Fees Order would also be unlawful if it could not be justified as a necessary restriction on the right of access to justice. The primary aim of the Order was to transfer some of the cost burden from taxpayers to users of the ET and EAT system. The government had assumed that higher fees would generate higher income and so achieve that aim. In order to obtain the maximum revenue, however, it was necessary to identify the optimal price for the service. That depended on the “price elasticity” of demand (a measure of the relationship between the level of fees and the number of ET cases brought). It was clear the fees were not set at the optimal price. The government had greatly underestimated their deterrent effect on the bringing of claims. Nor was there evidence that the level of fees had achieved the secondary aims – to incentivise earlier settlements and to discourage weak or vexatious claims.

12. EU law

Lord Reed then considered the impact of the fees regime on employment law claims derived from EU law. He referred to the EU principles of

effectiveness and effective judicial protection, and the right to a fair hearing under Article 6 of the European Convention of Human Rights (ECHR) which is separate from the EU. According to our obligation under ECHR any financial limitations on the right of access to a court or tribunal must pursue a legitimate aim. In his view this was entirely consistent with domestic law. The ability to pay fees was not determinative of their proportionality under EU law; other factors must be considered, including the stage of the proceedings at which the fees must be paid, whether non-payment might result in the claim never being examined on its merits and whether the fees are proportionate to the sum being claimed. Fees that were unrelated to the merits of a claim or its prospects of success should be subject to particularly rigorous scrutiny. Given that ET fees were, in practice, unaffordable by some people and were so high as, in practice, to prevent even people who could afford them from pursuing claims for small monetary amounts and those of a non-monetary type, Lord Reed concluded that the Fees Order imposed disproportionate restrictions on the exercise of EU-derived rights and was therefore contrary to EU law.

13. Discrimination

In a separate element of the judgement Lady Hale addressed UNISON's arguments relating to discrimination. Although it was unnecessary to decide the issue – given Lord Reed's findings – she considered that the Fees Order was indirectly discriminatory under S.19 of the Equality Act 2010. She reasoned that Type B cases (including discrimination claims) attract a higher fee, and a higher proportion of women bring Type B cases, women are therefore placed at a particular

disadvantage compared with men. The higher fees for Type B claims had not been shown to be justified as a proportionate means of achieving the government's stated aims, and so were discriminatory.

Further Information

More information on this and other equality matters is available from:

- ❑ Val Stansfield, Employment Rights Adviser at stansfieldv@tssa.org.uk or 020 7529 8046
- ❑ the TSSA Helpdesk – 0800 328 2673

The information has been drawn from a report by Incomes Data Services.

The information given here is for general guidance only and should not be regarded as a complete or authoritative statement of the law.

The full judgement is available from www.supremecourt.uk